

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-6010

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

HOWARD S. KATZ,

Plaintiff,

Vs.

75-6010

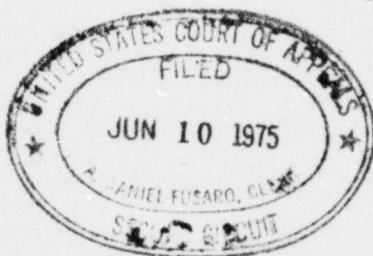
UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICE, DONALD ALEXANDER, Commissioner of
Internal Revenue, JOHN CLIFFORD, Revenue
Officer, STEPHEN J. DAVIDSON, Revenue Officer,

Defendants.

B
p/s

BRIEF & Appendix

MEMORANDUM OF LAW
IN SUPPORT OF APPEAL



HOWARD S. KATZ, Pro Se
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(212) 254-4791

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
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HOWARD S. KATZ,

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B. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The validity of Tax Court
2. The relevance of the Williams Packing decision and 26 U.S.C. §7421(a)
3. Failure of due process of any procedure which leaves one party destitute and thus unable to secure adequate legal advice.

C. STATEMENT OF THE CASE

In 1971 Appellant Katz was being audited by the Internal Revenue Service. The IRS requested that Katz waive the 3-year statute of limitations for such audits, and Katz refused. Thereupon the IRS auditor fabricated a fictitious audit, alleging a huge tax bill against Katz, which Katz refused to pay. Katz did not take his case to Tax Court, and the IRS seized Katz' bank and stock accounts and later levied against his wages. Katz then brought suit against the IRS contending that the levy was unconstitutional because it violated due process of law -- i.e., it had never been proved by any court of law that Katz owed any money to the IRS.

The IRS argued that Phillips v. Commissioner, 283 U.S. 589 (1931), which had upheld the IRS levy as constitutional, provided a specific 2-part procedure which reconciled the IRS levy power with due process of law: that the citizen be able to either (1) pay his tax and sue for a refund in District Court or (2) go to Tax Court. In the face of this argument Katz retreated from the contention that the IRS levy was unconstitutional in all cases to the contention

that it was unconstitutional in cases similar to his because in his case the IRS had alleged an amount against him far beyond his ability to pay; thus he did not have the option to pay his tax and sue for a refund.

Judge Tyler of the Southern District Court of New York in a decision dated Feb. 14, 1975 ruled that even though Katz did not have the 2-part procedure open to him as described in Phillips, the levy was constitutional in his case because Tax Court is a valid court and is capable of providing due process. This is the basic question on which Katz is now appealing.

D. ARGUMENT

1. The Validity of Tax Court

Appellant Katz disagrees with the following statement in Judge Tyler's decision:

"If plaintiff cannot pay the tax claim in full, so that his only recourse is to Tax Court, he still has not been denied due process. In Willmut Gas & Oil Company v. Fly, 322 F. 2d 301 (1963), the Fifth Circuit found that a statute which limited review exclusively to the Tax Court satisfied requirements of due process."

(Document 8, Judge Tyler's decision, pg. 6)

Appellant Katz contends that the "Court" in Tax Court is a misnomer. Tax Court is not a court; it is not in the judicial branch of the Government. It

is an agency in the Executive Branch. Therefore, leaving this as the only recourse to a taxpayer who has a dispute with the IRS denies him access to the courts, hence denying him due process. The argument for this contention is simple and straightforward:

The Constitution, in Article III, Section 1, states:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

(my underline)

The phrase "during good Behaviour" is not one of those which have given pause to legal experts. Its meaning is clear and unambiguous. It means that judges of Federal Courts cannot be removed from office except by impeachment. This requirement was put in the Constitution to ensure the independence of the judiciary.

The IRS Code, in Subchapter C, Part I, Section 7443(f) states:

"Removal From Office. -- Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."

(my underline)

There is no way to reconcile this provision with Article III, Section 1 of the Constitution. "Judges" of the Tax "Court" do not hold their offices during good behavior. They are not judges, and Tax "Court" is not a court.

I refer the Court to the pamphlet "The United States Courts" put out by the Committee on the Judiciary of the House of Representatives. On page 1 this pamphlet states:

"The Constitution assures the equality and independence of the Judicial Branch from the Legislative and Executive Branches. Although Federal judges are appointed by the President of the United States with the advice and consent of the Senate, and although funds for the operation of the courts are appropriated by the Congress, the independence of the United States courts is provided for in three respects:

First....

Second, Federal judges "hold their Offices during good Behavior" that is, as long as they desire to be judges and perform their work. They can be removed from office against their will only by impeachment.

Third....

These three provisions -- for judicial work only, for holding office during good behavior, and for undiminished compensation -- are designed to assure judges of independence from outside influence so that their decisions may be completely impartial."

"The United States Courts"
U.S. Gov't Printing
Office
page 1 (author's underline)

The independence of the judiciary is not a minor or unimportant part of the Constitution. It is a basic guardian of our freedom as had been driven home to America's Founding Fathers when the English King removed judges from office whose decisions he did not like.

The pamphlet "The United States Courts" does not list Tax Court as a court; it lists it as an Administrative Agency, and it does not include it in the discussion on courts.

Appellant Katz understood that he was not singled out for special treatment by the IRS. To conduct fraudulent audits on those who refuse to waive the statute

of limitations is a standard operating procedure for the IRS. It stands to reason then that the IRS must have good reason to believe that this procedure will be upheld by the Tax "Court." Can an impartial decision be counted upon from men so beholden to the Executive (for whom the IRS collects the revenues) that they can be removed from office by him for such a thing as inefficiency?

The Fifth circuit decision in Willmut Gas v. Fly is not binding either on this Court or on Judge Tyler. It is a most amazing decision. In it the Court declared:

"There is no constitutional guarantee of a hearing in an Article III Court."

What is one to make of such a statement? Are there different kinds of courts? Are we to presume that there are Article III courts, Article II courts and Article I courts? Of course this is nonsense. Article III is the section of the Constitution which sets up the court system of the United States. Any Institution not set up in accord with the provisions of Article III is not a court. To deny citizens a hearing in an Article III court is to deny them access to the courts completely. And this is a complete denial of the due process requirement of the Fifth Amendment.

It reflects poorly on Judge Tyler that he ignored the Constitution, which is binding on him and which he has sworn an oath to uphold, which is in fact the supreme law, in favor of an obscure decision by the Fifth Circuit, not binding on him, that completely denies the civil liberties for which the Founding Fathers fought.

2. The Relevance of Williams Packing

Judge Tyler is in error in citing Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962), as setting up a test which Katz must meet. Katz argues that he does meet this test in 1. above. Even under the most liberal view of the law there is no way to reconcile the removal from office provision of the IRS Code with the good behavior provision of the Constitution. As for the facts the IRS has never even denied that its assessment against Katz was fraudulent, designed for the purpose of punishing him for refusing to waive his legal rights.

However, Katz goes further and argues that he does not have to meet the Williams Packing test. The Supreme Court did not say in Enochs v. Williams Packing what Judge Tyler thinks they said. What the test in Williams Packing does apply to is the type of case described in Phillips v. Commissioner, that is, the type of case in which the taxpayer has the option of paying the tax and suing for a refund. As the Court stated in Williams Packing:

"The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund.

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (my underline)

But Katz' central contention is precisely that Phillips does not apply to him. He cannot pay the tax and then sue for a refund in District Court because the amount alleged against him is way beyond his means. The very strict requirement set up in Williams Packing applies only to taxpayers who have the means to pay

the tax and sue for a refund. Since these taxpayers have access to the courts through another avenue, a strict requirement through one avenue does not deny them due process.

Or perhaps the IRS is arguing that there is a different law for the rich and for the poor. If you are rich enough to pay the tax and sue for a refund, then you get access to the courts of this country. But if you are too poor to pay the tax, you don't.

3. Bias of Legal Advice

Finally, it is a basic denial of due process to prejudice someone's legal ability to fight a case. If two parties have a quarrel and party A seizes all of party B's wealth in advance of any legal proceedings, then the very judicial proceeding by which the relative justice of A's and B's claims will be judged is therefore biased; because now A can afford to hire the very best lawyer while B can afford only a second-rate lawyer, or perhaps even be forced to bring his case pro se.

This is precisely the condition of Appellant Katz. His very ability to adjudicate the issues is impaired because all of his money was seized prior to any adjudication. The fact that the IRS seizure is not required to leave the taxpayer sufficient money to hire adequate legal counsel is a gross distortion of justice and a denial of due process.

The Court should give a great deal of weight to this argument, not so much for the sake of Katz, who is an educated person and for whom the difficulties of bringing a case pro se are manageable, but for the sake of millions of less educated people who can not even begin to bring a legal case pro se. The precedent set in this case will apply to them. If Judge Tyler's decision that Tax "Court" is a court is upheld, they will have no alternative but complete subordination to any decision made by the IRS, no matter how unjust or how much in violation of law.

E. CONCLUSION

Judge Tyler's decision should be reversed. A declaratory judgement should be issued ordering that Katz' money be returned to him and declaring that the IRS has no authority to seize his wealth without first proving before a court of law that he owes a tax.

HOWARD S. KATZ, pro se

Code 2-11-70

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section 7482.

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COURT

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L.L. Inc., Englewood Cliffs, N. J.

7-1-71

Internal Revenue Code of 1954 (I.R.C.) 25,841

(c) Salary.—

(1) Each judge shall receive salary at the same rate and in the same installments as judges of the district courts of the United States.

(2) For rate of salary and frequency of installment see section 135, title 28, United States Code, and section 5505, title 5, United States Code.

Last amendment.—Sec. 7443(c) appears above as amended by Sec. 953 of Public Law 91-172, Dec. 30, 1969, effective (Sec. 962(a) of Public Law 91-172, Dec. 30, 1969) Dec. 30, 1969.

Prior amendments.—Sec. 7443(c) was previously amended by the following:
Recommendation of President in ac-
cordance with Sec. 225(h) of Public Law

99-293, Dec. 16, 1937, effective (Sec. 1236) of Public Law 99-293, Dec. 16, 1937) be-
ginning of the first pay period after
Feb. 12, 1939. *

Sec. 402(1) of Public Law 86-103, Aug. 14,
1964, effective (Sec. 501(a) of Public Law
88-126, Aug. 14, 1964) on first day of first pay
period beginning on or after July 1, 1964. *

Sec. 1(h) of Pu' s Ltr 9, Mar. 2, 1955. *

* Sec. 7443(c) as so amended is in P-H Cumulative Changes.

(d) Expenses for Travel and Subsistence.—Judges of the Tax Court shall receive necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be applicable to the United States Customs Court.

(e) Term of Office.—The term of office of any judge of the Tax Court shall expire 15 years after he takes office.

Last amendment.—Sec. 7443(e) appears above as amended by Sec. 952(b) of Public Law 91-172, Dec. 30, 1969 (qualified effective date rule in Sec. 962(c) of Public Law 91-

172, Dec. 30, 1969). Sec. 7443(e) as it read before this amendment is in P-H Cumula-
tive Changes.

(f) Removal From Office.—Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing, for in-
efficiency, neglect of duty, or malfeasance in office, but for no other cause.

(g) Disbarment of Removed Judges.—A judge of the Tax Court removed from office in accordance with subsection (f) shall not be permitted at any time to practice before the Tax Court.

SEC. 7444. ORGANIZATION.

(a) Seal.—The Tax Court shall have a seal which shall be judicially noticed.

(b) Designation of Chief Judge.—The Tax Court shall at least biennially designate a judge to act as chief judge.

(c) Divisions.—The chief judge may from time to time divide the Tax Court into divisions of one or more judges, assign the judges of the Tax Court thereto, and in case of a division of more than one judge, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a judge assigned thereto to serve thereon, is composed of less than the number of judges designated for the division, the chief judge may assign other judges to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of judges thereto.

(d) Quorum.—A majority of the judges of the Tax Court or of any division thereof shall constitute a quorum for the transaction of the business of the Tax Court or of the division, respectively. A vacancy in the Tax Court or in any division thereof shall not impair the powers nor affect the duties of the Tax Court or division nor of the remaining judges of the Tax Court or division, respectively.

SEC. 7445. OFFICES.

The principal office of the Tax Court shall be in the District of Columbia, but the Tax Court or any of its divisions may sit at any place within the United States.

PRENTICE-HALL, Inc., Englewood Cliffs, N. J.

\$ 7445

THE UNITED STATES COURTS

The position of the United States courts in our governmental organization is not difficult to understand when that organization is seen as a whole. Our government is a dual one—Federal and State—and the Federal Government in turn has three separate branches—the Legislative, the Executive, and the Judicial. The United States courts constitute the Judicial Branch of the Federal Government. Thus, the powers of the United States courts are first of all limited as Federal powers—they can exercise only those powers granted by the United States Constitution to the Federal Government—and secondly are limited as judicial—they cannot exercise powers belonging to the Legislative or Executive Branches of the Government.

THE JUDICIAL BRANCH

The Constitution assures the equality and independence of the Judicial Branch from the Legislative and Executive Branches. Although Federal judges are appointed by the President of the United States with the advice and consent of the Senate, and although funds for the operation of the courts are appropriated by the Congress, the independence of the United States courts is provided for in three respects:

First, under the Constitution these courts can be called upon to exercise only judicial powers and to perform only judicial work. Judicial power and judicial work involve essentially the application and interpretation of the law in the decision of real differences, that is, in the language of the Constitution, the decision of "Cases" and "Controversies." The courts cannot be called upon to make laws—the function of the Legislative Department—nor to enforce and execute laws—the function of the Executive Department.

Second, Federal judges "hold their Offices during good Behavior" that is, as long as they desire to be judges and perform their work. They can be removed from office against their will only by impeachment.

Third, the Constitution provides that the "Compensation" of Federal judges "shall not be diminished during their continuance in office." Neither the President nor the Congress can reduce the salary of a Federal judge.

These three provisions—for judicial work only, for holding office during good behavior, and for undiminished compensation—are designed to assure judges of independence from outside influence so that their decisions may be completely impartial.

STATE AND UNITED STATES COURT SYSTEMS

Throughout the United States there are two sets of judicial systems. One set is that of the State and local courts established in each State under the authority of the State government. The other is that of the United States courts set up under the authority of the Constitution by the Congress of the United States.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HOWARD S. KATZ,

Plaintiff,

Vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICE, DONALD ALEXANDER, Commissioner of
Internal Revenue, JOHN CLIFFORD, Revenue
Officer, STEPHEN J. DAVIDSON, Revenue Officer;
Defendants.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK.

CASE NO. 74 Civ. 2320

JUDGE Tyler

INDEX TO THE RECORD ON APPEAL

DOCUMENTS

Certified copy of docket entries

Complaint and Petition

Order to Show Cause and Temporary Restraining
Order plus Judge Tyler's memo denying same

Defendants Memorandum of Law - Response to
Show Cause Order

Stipulation and Order Extending Time

Defendants' Notice of Motion to Dismiss

Plaintiff's Answering Memorandum of Law

Defendants' Memorandum in Support of Motion to
Dismiss

Opinion #1002

Final Judgement

Notice of Appeal

Clerk's Certificate

A-B

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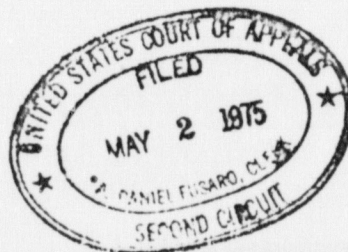
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75-6010

CIVIL DOCKET
UNITED STATES DISTRICT COURT

PRO 3

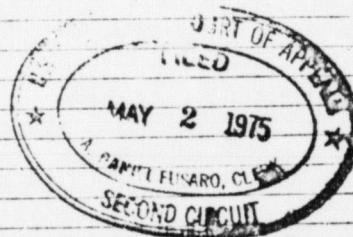
JUDGE TYLER

Jury demand date:

74 CIV. 2320

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
HOWARD S. KATZ, pro se	For plaintiff: Howard S. Katz, pro se 84 4th Ave., #6M, NYC 10003 254-4791
VS.	
UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE DONALD ALEXANDER, Comm. of IRS JOHN CLIFFORD, Revenue Officer STEPHEN J. DAVIDSON, Revenue Officer	4-14-75
	For defendant:



STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	2/24/75	H. Katz	15-	
		3/31/75	W.S. Katz	5-	15-
J.S. 6 mailed ✓	Marshal	4/14/75	Katz		5-
		4/15/75	Quinn		
Basis of Action: Title 26, Chapter 64 Subchapter d Section 6331, etc. Dispute between Pltff & Deft. as to any tax money owed.	Docket fee Witness fees Depositions				

JUDGE TYLER
74 CIV. 232

DATE	PROCEEDINGS	Date Order Judgment N
May 29-74	Filed complaint and issued summons.	
May 29-74	Filed Pltff's Order to Show Cause and Temporary Restraining Order re: why a preliminary injunction should not be issued enjo- ing debts from levying upon Pltff's wages or bank account ret. 6/7/74, 2:15 p.m., Room 501.	
Jun 20-74	Filed Defts' Memorandum of Law in response to Pltff's Order to Show Cause.	
Jun 20-74	Filed Memo End. on on Order to Show Cause of May 29, 74. For foregoing reasons, court denies pltff's motion for preliminary injunction. So Ordered. Tyler, J. (Mn) (by Pro Se Clerk)	
Jun 21-74	Filed Stip. Order extending time for debt to answer complaint to 9/9/74. Tyler, J.	
Jun 10-74	Filed Defts Notice of Motion dismissing complaint for lack of jurisdiction ret. 9/27/74, 9:30 A.M.	
Jun 19-74	Filed Pltff's Answering Memorandum of Law on Deft's Motion to dismiss for failure to allege facts sufficient to support Court's jurisdiction and failure to state a claim upon which relief can be granted.	
Jun 19-74	Filed Defts. Notice of Motion for an order granting summary judgment dismissing pltffs complaint ret. 11/1/74, 2:20 P.M.	
Jun 19-74	Filed Defts' Memorandum of Law in support of Motion for Summary Judgment.	
Jun 19-74	Filed OPINION 41902. Motion to dismiss must accordingly be granted in all respects. SETTLE ORDER AND JUDGMENT ACCORDINGLY. Tyler, J. (mn)	
Jun 19-74	Filed Final Judgment. Ordered that debts USA, IRS Service et al shall have judgment dismissing pltffs complaint with prejudice together with costs & disbursements to be taxed in action. Tyler, J. JUDGMENT ENTERED. Clk (mn) Ent. 3/26/75	
7/14/75	Filed Pltff (Pro Se) Notice of Appeal from Settle Order & Judgment of 2/14/75 & final judgment of 3/19/75. (mailed notice to William G. Ballaine, 4/15/75)	
7-10-74	<i>Filed Defts memo in Support of their motion to dismiss</i>	

A TRUE COPY
RAYMOND F. BERCHARDT, Clerk
[Signature]
Deputy Clerk

B

HOWARD S. KATZ,

Plaintiff,

Vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE
SERVICE, DONALD ALEXANDER, Commissioner of
Internal Revenue, JOHN CLIFFORD, Revenue
Officer, STEPHEN J. DAVIDSON, Revenue Officer,
Defendants

CASE NO. 74 Civ. 2320

JUDGE Tyler

CLERK'S CERTIFICATE.

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United
States for the Southern District of New York, do hereby certify that the
certified copy of docket entries lettered A-B, and the original
filed papers numbered 1 thru 14, and ~~15~~
15, inclusive, constitute the record on appeal in the above
entitled proceeding; except for the following missing documents:

DATE FILED

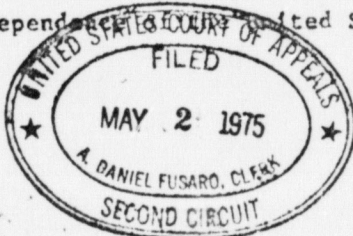
10-9-74

10-9-74

PROCEEDINGS

Defendants' notice of motion
for summary judgement
Def. mem. of law in support
of motion for summary
judgement

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to
be hereunto affixed, at the City of New York, in the Southern District
of New York, this 2nd day of May, in the year of
our Lord, One thousand nine hundred and seventy five, and of
the Independent States the 1975th year.



Raymond F. Burghardt
Clerk of the Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
FEB 19 10 18 AM '75
S.D. OF N.Y.

-----X
HOWARD S. KATZ,

Plaintiff,

MEMORANDUM

Pro Se 74 Civ. 2320 HRT

-against-

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE, et al.,

Defendants.
-----X

TYLER, D.J.

Plaintiff commenced this action in May, 1974, in response to an Internal Revenue Service ("IRS") levy upon his property to satisfy deficiencies asserted in audits of his 1968, 1969, and 1970 income tax returns. After being notified, apparently in 1972, of the IRS claim for such additional taxes, plaintiff did not challenge the claim in Tax Court, as was his right under 26 U.S.C. § 6213(a). Thereafter, the IRS, pursuant

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(8)

to 26 U.S.C. § 6331, levied upon plaintiff's bank accounts, securities, and wages and further issued a summons, pursuant to 26 U.S.C. § 7602(2), directing plaintiff to produce certain books and records relating to his tax liability. Plaintiff has not fully paid the additional taxes claimed for any one tax year, the payment of which could serve as a basis for a refund action in this court. Instead, seeking declaratory and injunctive relief in this suit, plaintiff challenges the constitutionality of 26 U.S.C. §§ 6331 and 7602, as well as the constitutionality of the Tax Court, established pursuant to 26 U.S.C. § 7441, and requests that a three-judge court be convened to hear and decide his claims.

The essence of plaintiff's position is that he is being deprived of his property without due process of law in violation of the Fifth Amendment, as the IRS may levy upon this property "unilaterally" without going before a court of law. Congress, of course, has provided methods by which a taxpayer may challenge such a levy- either by instituting an action in the Tax Court prior to paying the asserted tax or by paying in full the claimed tax and then instituting a refund action in the District Court. But plaintiff argues that because he cannot pay the tax, the statutory District Court

alternative is not available to him, and the only remaining alternative -
sult in the Tax Court - does not satisfy his rights to due process, as the
Tax Court is not an independent Article III Court, but rather an "agency"
in the Executive Branch. Plaintiff further contends that the IRS levy,
because it did not issue from a court of law, constitutes an unreasonable
seizure in violation of the Fourth Amendment. Finally, he contends that
the levy denies him of his Seventh Amendment right to trial by jury.

Defendant has moved to dismiss, pursuant to Rule 12(b)(2)^{1/} and (6),
F.R.Civ.P., on the grounds of lack of subject matter jurisdiction and
failure to state a claim upon which relief can be granted.

At the outset, plaintiff has a heavy burden of going forward with
his action, because he seeks injunctive relief in a matter related to the
collection of federal taxes. Section 7421(a) of the Internal Revenue Code
of 1954, 26 U.S.C. § 7421(a), provides that:

^{1/} Rule 12(b)(1) deals with lack of subject matter jurisdiction. As
plaintiff had adequate notice of the grounds of defendant's motion,
this court will treat said motion as made pursuant to Rule 12(b)(1)
and (6).

"Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1) [Tax Court proceedings and civil actions by persons other than taxpayers], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person...."

In Enochs v. Williams Packing & Navigation Co., 370 U.S. 1

(1962), the Supreme Court found that:

"[t]he object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."
Id. at 5.

The Court only permitted a narrow exception to this withdrawal of jurisdiction: where (1) it is apparent, on the basis of information available to the Government at the time of suit, that it cannot establish its claim under the "most liberal" view of the law and the facts, and (2) the taxpayer's claim meets the traditional requirements for equity jurisdiction.

Id. at 7. The Supreme Court recently discussed its Williams Packing test in Alexander v. "Americans United", Inc., 416 U.S. 752 (1974) and Bob Jones University v. Simon, 416 U.S. 725 (1974). In Alexander, the Court indicated that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under

§ 7421(a), 416 U.S. at 759. Also of no consequence to the success requirement is the degree of harm which the taxpayer may suffer - even irreparable injury such as the ruination of the taxpayer's enterprise, Bob Jones, supra, 416 U.S. at 745. Thus, though plaintiff in this case has asserted constitutional claims and has alleged near destitution as a consequence of the IRS levy, he must still meet both the Williams Packing requirement of showing certainty of success on the merits and the traditional equitable test of no adequate remedy at law. In this case, these requirements overlap to some extent, as part of plaintiff's constitutional claim is that his available remedies are inadequate to satisfy due process.

Plaintiff cannot meet these requirements. The adequacy of plaintiff's legal remedies, as well as the constitutionality of the IRS levy and summons powers, have been consistently upheld. In Flora v. United States, 362 U.S. 145 (1960), the Supreme Court indicated that a taxpayer's alternative remedies are to pay in full the claimed tax and then commence a refund action in the Federal District Court or to institute an action in Tax Court before payment of the claimed amount. These alternative remedies, as provided in the Internal Revenue Act then applicable, were found to satisfy due process requirements by the Supreme

Court in Phillips v. Commissioner, 283 U.S. 589, 597-9 (1931). If plaintiff cannot pay the tax claim in full, so that his only recourse is to Tax Court, he still has not been denied due process. In Willmut Gas & Oil Company v. Fly, 322 F.2d 301 (1963), the Fifth Circuit found that a statute which limited review exclusively to the Tax Court satisfied requirements of due process.

Even if resort to the Tax Court is now barred because the time for seeking such review has expired, plaintiff may not complain that he has had no adequate remedy. He is in the same position as any other person whose action is barred by the statute of limitations. See Flora v. United States, 362 U.S. at 175.

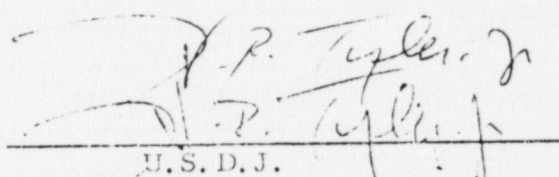
As for other claims asserted by plaintiff, the constitutionality of the Tax Court has been upheld by the Fifth Circuit, Nash Miami Motors, Inc. v. Commissioner, 358 F.2d 636 (1966). The constitutionality of the government's summary tax collection procedures, now provided for in

26 U.S.C. § 6331, was upheld by the Supreme Court in Phillips, supra and reaffirmed by the Sixth Circuit in Trent v. United States, 442 F.2d 405 (1971). The constitutionality of 26 U.S.C. § 7602, and an IRS summons issued in conformity with this statute, were upheld by the Court of Appeals for this circuit in United States v. Shlom, 420 F.2d 263 (1969).

Given this weighty judicial precedent in support of its position, there is little doubt that the government can establish its claim. Therefore, under the Williams Packing test, this court lacks jurisdiction to entertain plaintiff's suit. The motion to dismiss must accordingly be granted in all respects.

Settle order and judgment accordingly.

Dated: February 4th, 1975



U.S. D.J.

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In that case, Mr. Justice Brandeis, speaking for the Court, stated that:

"The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." 283 U.S. at 595.